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	AC-01	NSAE-00	OIC-02	OMB-01	OPIC-01	PA-00	PM-00
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FM AMEMBASSY HARARE
TO SECSTATE WASHDC IMMEDIATE 8042
INFO NSC WASHDC IMMEDIATE
SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
AMEMBASSY NAIROBI

C O N F I D E N T I A L SECTION 01 OF 02 HARARE 000392

SIPDIS

NSC FOR SENIOR AFRICA DIRECTOR GAYLE SMITH
LONDON FOR GURNEY
PARIS FOR WILLIAMS
NAIROBI FOR PFLAUMER

E.O. 12958: DECL. 01/19/11

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SUBJECT: SUPREME COURT HEARS MDC CHALLENGE OF MUGABE ELECTORAL DECREE

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REF: A) 00 HARARE 6955

CLASSIFIED BY CHARGE D'AFFAIRES EARL IRVING. REASONS: 1.5
(B) AND (D).

SUMMARY

[¶11.](#) (C) ON JANUARY 19, ZIMBABWE'S SUPREME COURT HEARD ARGUMENTS IN THE CASE BROUGHT BY THE OPPOSITION MOVEMENT FOR DEMOCRATIC CHANGE (MDC) AGAINST PRESIDENT MUGABE'S RECENTLY-ISSUED DECREE PROHIBITING THE NULLIFICATION OF THE ELECTION OF ANY MEMBER OF PARLIAMENT. THE MDC ATTORNEY ARGUED PERSUASIVELY THAT THE DECREE SHOULD BE STRUCK DOWN BECAUSE IT PURPORTS TO LEGITIMIZE ELECTIONS WHICH WERE NOT FREE AND FAIR, IN VIOLATION OF THE ELECTORAL ACT, AND BECAUSE IT SEEKS TO BLOCK JUDICIAL ACCESS TO AGGRIEVED PARTIES WHOSE CIVIL RIGHTS MAY HAVE BEEN VIOLATED, IN CONTRAVENTION OF THE CONSTITUTION. THE PRESIDING JUSTICES GREETED WITH SKEPTICISM THE GOVERNMENT'S ARGUMENTS THAT THE CASE BELONGED IN THE HIGH COURT, NOT THE SUPREME COURT, AND THAT PARLIAMENT'S LEGAL COMMITTEE SHOULD BE GIVEN TIME TO EXAMINE THE PRESIDENTIAL DECREE. AFTER THE PRESENTATION OF ORAL ARGUMENTS, CHIEF JUSTICE GUBBAY MADE NO COMMITMENT ABOUT WHEN THE COURT'S DECISION WILL BE HANDED DOWN, BUT, GIVEN THE SIGNIFICANCE OF THE CASE, WE EXPECT A RULING WITHIN A MATTER OF DAYS. END SUMMARY.

JANUARY 19 HEARING

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[¶12.](#) (U) THE SUPREME COURT ON JANUARY 19 HEARD THE MDC'S CHALLENGE OF PRESIDENT MUGABE'S RECENT DECREE AMENDING THE ELECTORAL ACT. AS REPORTED IN REFTEL, MUGABE'S DECREE, ISSUED ON DECEMBER 8, PROHIBITED THE NULLIFICATION OF THE ELECTION OF ANY MEMBER OF PARLIAMENT, EFFECTIVELY DERAILING THE MDC'S LEGAL CHALLENGES TO THE RESULTS IN 38 CONSTITUENCIES IN LAST JUNE'S PARLIAMENTARY ELECTIONS. POLOFF WAS IN THE PACKED COURTROOM, WHICH ALSO INCLUDED EDISON ZVOBOGO, A LONG-TIME ZANU-PF STALWART WHO WAS EXPelled FROM THE PARTY POLITBURO IN DECEMBER, AND JOURNALISTS FROM THE NEW YORK TIMES AND BBC.

MDC'S ARGUMENTS

[¶13.](#) (U) THE MDC'S LEAD ATTORNEY, CHRIS ANDERSEN, URGED THAT THE PRESIDENT'S DECREE BE STRUCK DOWN IMMEDIATELY, BECAUSE IT VIOLATED BOTH THE ELECTORAL ACT AND ZIMBABWE'S CONSTITUTION. THE ELECTORAL ACT, ANDERSEN EXPLAINED, REQUIRES THAT ANY ELECTION MUST BE FREELY AND FAIRLY

CONDUCTED. HE POINTED OUT, HOWEVER, THAT THE ELECTION HAD NOT BEEN CONSISTENT WITH THAT STANDARD, BUT INSTEAD HAD BEEN FRAUGHT WITH SERIOUS IRREGULARITIES, INCLUDING MURDER, BEATINGS, AND BALLOT-BOX RIGGING. ANDERSEN QUOTED FROM THE FINAL REPORT OF THE COMMONWEALTH OBSERVER TEAM, WHICH CHARACTERIZED THE ELECTION AS MARRED BY A SYSTEMATIC GOVERNMENT-ORGANIZED CAMPAIGN OF VIOLENCE AND INTIMIDATION. A FURTHER CONSIDERATION FOR THE COURT, ANDERSEN CONTINUED, IS THAT THE PRESIDENT HAD A DIRECT PERSONAL INTEREST IN THE RESULTS OF THE JUNE ELECTION. ALLOWING THE PRESIDENT'S DECREE TO STAND, THEREFORE, WOULD BE TANTAMOUNT TO

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PERMITTING ONE WITH A PERSONAL INTEREST IN A PARTICULAR OUTCOME TO REFEREE A SOCCER MATCH.

14. (U) ZIMBABWE'S CONSTITUTION, ANDERSEN CONTINUED, ENSHRINES IN THE JUDICIARY THE POWER TO ARBITRATE COMPLAINTS FROM CITIZENS ALLEGING CIVIL RIGHTS VIOLATIONS. SINCE THE ELECTORAL DECREE SEEKS TO BLOCK ACCESS TO THE COURTS FOR THE VICTIMS OF THE VIOLENCE ASSOCIATED WITH THE PARLIAMENTARY ELECTION, IT CLEARLY IS UNCONSTITUTIONAL, ANDERSEN ALLEGED. ANDERSEN MAINTAINED THAT, EVEN IF THE JUSTICES WERE TO DISAGREE THAT THE DECREE WAS UNCONSTITUTIONAL OR VIOLATED THE ELECTORAL ACT, HE HOPED THEY WOULD AGREE THAT, IN ISSUING IT, THE PRESIDENT SUBVERTED BOTH THE CONCEPT AND PRACTICE OF DEMOCRACY AS IT IS UNDERSTOOD IN THE MODERN WORLD.

THE GOVERNMENT'S ARGUMENTS

15. (U) THE GOVERNMENT RETAINED AS ITS LEAD ATTORNEY A SOUTH AFRICAN -- MR. CASSIM (AS HEARD) -- INSTEAD OF FOLLOWING THE NORMAL PRACTICE OF USING ONE OF ITS OWN LAWYERS IN THE ATTORNEY-GENERAL'S OFFICE, A DECISION WHICH ELICITED SOME CRITICISM IN THE INDEPENDENT PRESS. CASSIM MADE TWO ESSENTIAL ARGUMENTS. FIRST, THAT THE ELECTORAL

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ACT GIVES THE PRESIDENT THE AUTHORITY TO ISSUE REGULATIONS RELATING TO ELECTIONS. THE IMPROPER USE OF THAT AUTHORITY, HE ARGUED, WAS A LEGITIMATE SUBJECT OF DEBATE, BUT ONE THAT SHOULD BE HEARD IN THE HIGH COURT, NOT THE SUPREME COURT, AS IT DID NOT INVOLVE CONSTITUTIONAL QUESTIONS. TWO OF THE FIVE JUSTICES STRONGLY OBJECTED TO CASSIM'S CONTENTION THAT THE SUPREME COURT DID NOT HAVE JURISDICTION IN THIS CASE. CASSIM'S SECOND POINT WAS TO URGE THE COURT, IF IT DECIDED THAT THE CASE DID POSE LEGITIMATE CONSTITUTIONAL ISSUES, TO REFRAIN FROM HEARING IT UNTIL PARLIAMENT'S LEGAL COMMITTEE HAD FINISHED EXAMINING THE LEGALITY OF MUGABE'S DECREE. SEVERAL JUSTICES DISAGREED WITH THE ARGUMENT THAT THE COURT SHOULD WAIT FOR PARLIAMENT TO CONSIDER THE ISSUE, STRESSING THAT THESE WERE TWO INDEPENDENT PROCESSES THAT COULD HAPPEN SIMULTANEOUSLY.

COMMENT

16. (C) THE STAKES ARE EXTREMELY HIGH IN THIS CASE, EVIDENCED BY THE PRESENCE OUTSIDE THE COURT OF THREE GOVERNMENT MINISTERS -- JONATHAN MOYO OF INFORMATION AND PUBLICITY, JOSEPH MADE OF LANDS, AGRICULTURE, AND RESETTLEMENT, AND IGNATIUS CHOMBO OF LOCAL GOVERNMENT, PUBLIC WORKS, AND NATIONAL HOUSING -- ATTEMPTING TO SPIN MEMBERS OF THE PRESS. MANY OBSERVERS SAID THEY FELT SORRY FOR CASSIM, AS HE HAD A VERY TALL, PERHAPS IMPOSSIBLE, TASK IN DEFENDING THE GOVERNMENT'S POSITION. CHIEF JUSTICE GUBBAY MADE NO COMMITMENT ABOUT WHEN A RULING MIGHT BE HANDED DOWN, BUT WE EXPECT IT WILL BE IN A MATTER OF DAYS, GIVEN THE IMPORTANCE OF THE CASE. JUDGING FROM THE STRONG

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SKEPTICISM WITH WHICH THE JUSTICES GREETED CASSIM'S ARGUMENTS (SEVERAL EVEN ROLLED THEIR EYES AS HE MADE HIS POINTS), WE ANTICIPATE THE COURT WILL OVERTURN THE DECREE. SUCH A RULING WOULD PERMIT THE MDC'S CHALLENGES TO THE RESULTS IN 38 CONSTITUENCIES TO MOVE FORWARD IN THE HIGH COURT, AND THE MDC WOULD HAVE TO WIN ONLY 20 OF THOSE SEATS TO SECURE A MAJORITY IN PARLIAMENT. A SUPREME COURT RULING IN FAVOR OF THE MDC, HOWEVER, WOULD BE ONLY HALF THE BATTLE, AS THE JUDGE PRESIDENT OF THE HIGH COURT, GODFREY CHIDAYAUSIKU, IS CLOSELY ALLIED WITH ZANU-PF AND WILL DO ALL HE CAN TO DELAY ACTION ON THE ELECTORAL CHALLENGES.

IRVING

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